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**WISCONSIN COURT OF APPEALS**

110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688  
Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
Web Site: [www.wicourts.gov](http://www.wicourts.gov)

**DISTRICT II**

October 21, 2020

To:

Hon. Mark F. Nielsen  
Circuit Court Judge  
Racine County Courthouse  
730 Wisconsin Ave.  
Racine, WI 53403

Samuel A. Christensen  
Clerk of Circuit Court  
Racine County Courthouse  
730 Wisconsin Ave.  
Racine, WI 53403

Nicholas DeSantis  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707

Patricia J. Hanson  
District Attorney  
730 Wisconsin Ave.  
Racine, WI 53403

Jeffrey W. Jensen  
111 E. Wisconsin Ave., Ste. 1925  
Milwaukee, WI 53202-4825

You are hereby notified that the Court has entered the following opinion and order:

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2020AP288-CR

State of Wisconsin v. Kevin E. Watson (L.C. #2018CF880)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Kevin E. Watson appeals from his judgment of conviction and from the denial of his postconviction motion for resentencing. Watson argues that his trial counsel provided ineffective assistance at sentencing. Based upon our review of the briefs and record, we

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).<sup>1</sup> We summarily affirm.

Watson pled no contest to two counts of delivery of cocaine, one count of possession of cocaine, and three counts of possession of a controlled substance, exposing him to over twenty-three years of prison time. Watson was on extended supervision for prior drug offenses at the time he committed the drug-related offenses at issue in this case. In return for his plea, the State agreed to dismiss and read in charges of possession of drug paraphernalia, maintaining a drug house, and two counts of delivery of cocaine. The State agreed to and did recommend five years' initial confinement (IC) and five years' extended supervision (ES). The court sentenced Watson to five and one-half years' IC and five years' ES and made Watson eligible for earned release after three years.

Trial counsel's argument at sentencing focused on the effect Watson's powerful addiction to drugs had on his life and that Watson's drug sales were to support his own drug addiction. Counsel argued that Watson was "very ashamed" of his criminal record and was actively involved in obtaining his GED. Counsel argued that Watson needed to stay sober to avoid future crimes and asked the court to be creative in fashioning a sentence toward that goal, concurrent to the sentence he was already serving.

The court accepted counsel's request to look at Watson's positive attributes, commenting that "he has enough for him in terms of decent qualities, if he will only recognize[] them in himself." The court, however, also took into account all sentencing factors, commenting that at

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version.

forty years of age and with a lengthy criminal history that Watson “deserves a significant penalty.”

Watson moved for resentencing on the ground of ineffective assistance of counsel, but offered no showing of prejudice. The court held a *Machner*<sup>2</sup> hearing at which trial counsel testified that her goal was to get Watson the shortest sentence possible. Counsel had practiced for years in front of the sentencing judge, and based on her knowledge of the judge, her strategy was to key in on Watson’s addiction as the cause of his criminal behavior. Counsel testified that she “didn’t have a lot to work with” given Watson’s history and asked the judge to fashion a sentence that would help Watson beat his addiction. The court denied Watson’s motion for resentencing, finding that counsel was not deficient and in fact was effective in her arguments as the court factored her remarks into its sentence, although “perhaps not as leniently as the defendant would have liked.” Watson appeals.

Under the *Strickland* test, a party asserting an ineffective assistance of counsel claim must prove both that counsel’s performance was deficient and that he or she was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need not address both prongs of the *Strickland* test if the party does not make a sufficient showing on one prong. *Id.* at 697. Ineffective assistance of counsel presents a mixed question of fact and law, and we will uphold the circuit court’s factual determinations unless they are clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). Whether trial counsel’s

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<sup>2</sup> *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

performance was deficient and whether it prejudiced the defendant are questions of law we review de novo. *Id.* at 634.

To establish deficient performance, a defendant must show that trial counsel's acts or omissions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. "Counsel enjoys a 'strong presumption' that his [or her] conduct 'falls within the wide range of reasonable professional assistance.'" *State v. Carter*, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695 (citation omitted). We are "'highly deferential' to counsel's strategic decisions and make 'every effort ... to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *State v. Domke*, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364 (citation omitted); *see also Strickland*, 466 U.S. at 690 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.").

On appeal, Watson argues his trial counsel was constitutionally deficient at sentencing as counsel "wholly abdicated her responsibility to zealously advocate for Watson" and that he "would have been better off if counsel had said nothing." Watson asks us to "presume[]" that he was prejudiced by counsel's deficient performance. As counsel was not deficient and as we do not presume prejudice under these circumstances, we affirm Watson's judgment of conviction and the circuit court's denial of Watson's motion for resentencing.

First, trial counsel's sentencing strategy was not deficient. Watson pled no contest to crimes that subjected him to more than twenty-three years in prison, and he received five and one-half years' IC. Watson's history of criminal behavior was evident by the fact that he

committed these crimes while on ES from another drug-related conviction. Counsel strategically aimed her comments in an effort to obtain the best sentence she could for Watson, and as the trial court noted, it heard and took her argument into account in its sentence. Second, Watson must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” See *Pitsch*, 124 Wis. 2d at 642 (quoting *Strickland*, 466 U.S. at 694). While Watson does not like the result, he offers no explanation as to how the result would have been different with a different sentencing argument (nor does he tell us what that argument would have been). Counsel was not deficient, and no prejudice has been shown or argued.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*